

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
GASIT, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period January 1, 1983	:	
through April 30, 1985.	:	

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Petitioner, Gasit, Inc., 791 North Bedford Road, Bedford Hills, New York 10507, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period January 1, 1983 through April 30, 1985 (File No. 803320).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 9, 1987 at 1:15 P.M., with all briefs to be submitted by March 23, 1989. Petitioner appeared by Mortimer Todel, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael Glannon, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation has established proof of mailing of a denial of refund claim dated June 23, 1986.

II. Whether the Division's denial of petitioner's claim for refund of sales tax paid to its supplier of gasoline for the period in question was proper.

III. Whether chapters 454 and 469 of the Laws of 1982 violate the equal protection provisions of the New York State and U.S. Constitutions.

FINDINGS OF FACT

Petitioner, Gasit, Inc., operated an automobile service station and convenience store located in Bedford Hills, New York which sold gasoline, groceries and cigarettes at retail. During the period in issue, petitioner purchased gasoline from its supplier, ARCO Petroleum Products Co. ("ARCO"), and paid sales tax to ARCO on such purchases based on the regional average retail sales price for gasoline. Thereafter, petitioner sold the gasoline to its retail customers at a price lower than the regional average retail sales price.

On or about December 31, 1985 and May 19, 1986, petitioner filed two applications for refund of prepaid sales tax on motor fuel sold by retail service stations as follows:

DATE FILED

PERIOD

REFUND CLAIMED

December 31, 1985      January 1, 1983 - December 31, 1983

\$11,149.61

May 19, 1986      January 1, 1984 - April 30, 1985

\$23,284.60

In conjunction with its applications for refund of sales tax, petitioner submitted schedules which showed the sales tax due, the sales tax paid to petitioner's supplier and the sales tax which would be due if calculated on petitioner's actual retail sales price. The amount of sales tax was apparently based on the combined New York State and Westchester County tax rate. Petitioner's refund claims were premised upon the assertion that the tax payments to the supplier exceeded the amount of tax which would be due if computed on petitioner's actual retail sales.

During the period at issue, petitioner's sales tax payments to ARCO on the purchase of gasoline exceeded the amount of sales tax which would be due if computed based upon petitioner's actual retail sales of gasoline.

In response to the application for refund filed on December 31, 1985, the Division of Taxation, by letter dated February 24, 1986, notified petitioner of its determination to deny the refund claim. In response to the application for refund filed on May 19, 1986, the Division, by letter dated June 23, 1986, again denied petitioner's refund claim. On both occasions, the Division took the position that the Tax Law does not allow a refund under the circumstances presented. The letters did not specify the period or amount of the refund claim.

The Division did not present any evidence of mailing of the refund denials to petitioner.

On or about May 27, 1986, petitioner filed a petition with the former Tax Appeals

Bureau protesting the refund denial dated February 24, 1986. The petition refers to the period in issue as January 1, 1983 through April 30, 1985. Petitioner contends it never received the denial letter dated June 23, 1986 and only became aware of its existence at the hearing.

### CONCLUSIONS OF LAW

A. Tax Law § 1139(b) requires that the Commissioner of Taxation and Finance (formerly State Tax Commission), after determining whether to grant or deny a refund or credit application, mail to the applicant a notice of his determination. Such determination shall be final and irrevocable unless such applicant shall, within 90 days after the mailing of notice of such determination, petition the Division of Tax Appeals (formerly Tax Commission) for a hearing. The mailing of such a notice is presumptive evidence of its receipt by the person to whom it is addressed (Tax Law § 1147[a][1]). This presumption of receipt arises upon presentation of proof by the sender that it has a routine office practice and procedure for mailing the notices which demonstrates that the notices were, in fact, properly addressed and mailed (Matter of T. J. Gulf, Inc. v. New York State Tax Commission, 124 AD2d 314, 315; see, Matter of Mildred Colon, State Tax Commission, March 11, 1987).

The presumption of receipt cannot arise where the Division does not present any evidence of mailing a notice of refund denial to the applicant. Affidavits or testimony as to the Division's normal course of business or office practices which would tend to prove that the instant mailing was, in fact, effected are essential elements of proof of proper mailing (McLean v. Procaccino, 53 AD2d 965). Here, the Division introduced into evidence the June 23, 1986 denial letter, but failed to offer any affidavits or testimony relating to office mailing practice and procedure. Thus, the minimal evidence of mailing of the refund denial presented by the Division was insufficient to give rise to the presumption of receipt (c.f., Matter of T. J. Gulf, Inc. v. New

York State Tax Commission, supra).

Since the Division has not proved proper mailing of the refund denial, dated June 23, 1986, the time period for filing of a petition was not triggered (see, Tax Law § 1139[b]), and petitioner is entitled to a hearing concerning the refund application filed on May 19, 1986. (See, Matter of Ruggerite, Inc. v. State Tax Commission, 64 NY2d 688.)

B. Prior to September 1, 1982, sales tax on motor fuel was imposed and required to be collected on each gallon of gasoline sold at retail service stations (Tax Law § 1111[former (d)]). The tax rate was applied to the service station's actual selling price, and each individual station was required to collect and remit the tax.

Beginning September 1, 1982 (L 1982, chs 454 and 469) and during the period in issue here, the retail sales tax on motor fuel was collected on sales by distributors to non-distributors. Thus, petitioner was required to pay sales tax on its purchases of gasoline from its supplier, ARCO. The sale from ARCO to petitioner constituted a retail sale. Tax Law § 1101(b)(4)(former [ii]) provided "a sale of automotive fuel [including motor fuel] by a distributor is deemed to be a retail sale". The tax was thus generally imposed at a higher point in the distribution chain than the point of sale by the service station. The rate of tax was the same as under prior law, but the price to which it applied was not the actual selling price. For part of the period at issue, the tax was calculated on a statewide average retail markup (Tax Law § 1111[e][former (1)], as amended by L 1982, ch 454); for the remainder of the period, beginning March 1, 1983, it was calculated on a regional average retail sales price (Tax Law § 1111[e][former (1)], as amended by L 1982, ch 930). In either event, the tax collected by the distributor was included in the cost to the service station and passed through to the ultimate consumer (Tax Law § 1111[e][former (4)]). The price shown on the pump was to include the tax so paid (see, Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

C. Petitioner argues that the statutory scheme resulted in the imposition of a different tax rate on different service stations, depending on the selling price from the service station to the ultimate consumer. It is petitioner's position that by charging more than the regional average retail price and collecting a higher amount of tax than it paid to its distributor, a service station's effective sales tax rate would be lower than the rate at which the station's liability was calculated. Conversely, by charging less than the regional average retail price and collecting a lesser amount of tax than it paid to its distributor, a service station's effective sales tax rate would be higher than the rate at which the station's liability was calculated.

D. Petitioner's position is based upon a false premise, namely that the tax collected by service stations at the pump was calculated by applying the applicable State and local sales tax to the pump selling price. This was not the case during the period in issue.

Pursuant to Tax Law § 1111(former [e]), the service station passed through the tax which it paid to its suppliers to its customers. There was no provision for service stations to collect a tax based on their actual selling prices. If the actual sales price was higher than the regional average retail sales price, the retail service station owner was not liable for additional tax due. Conversely, if the actual sales price was lower than the regional average retail sales price, no refund was due. Under the statutory scheme then in place, the retail sale had occurred for sales tax purposes when the motor fuel was sold by the distributor to the service station (or other non-distributor); as a consequence, the amount of the tax was fixed regardless of the station's actual selling price and was to be passed through by the station to the ultimate consumers. As the tax rate imposed on the retail sale from the distributor to the service station was the same regardless of the station's actual selling price, there is no basis for petitioner's claim that service stations similarly situated paid tax at different sales tax rates (see, Matter of Fourth Day Enterprises, supra).

E. At the administrative level, it is presumed that statutes are constitutional and that chapters 454 and 469 of the Laws of 1982 in particular are constitutional (see, Matter of Fourth Day Enterprises, supra).

F. The petition of Gasit, Inc. is denied in all respects and the denials of petitioner's refund claims are sustained.

DATED: Troy, New York

August 3, 1989

/s/ Joseph W. Pinto, Jr.

ADMINISTRATIVE LAW JUDGE